DOCUMENT RESUME

ED 292 173 EA 019 807

TITLE CASDA Annual School Law Conference. Proceedings (2nd, Latham, New York, July 16, 1987).
INSTITUTION Capital Area School Development Association, Albany, NY.
PUB DATE Jul 87
NOTE 113p.
AVAILABLE FROM Publication Sales, Capital Area School Development Association, University at Albany, Husted Hall-211, 135 Western Avenue, Albany, NY 12222 ($8.00 with order).
PUB TYPE Collected Works - Conference Proceedings (021) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC05 Plus Postage.
DESCRIPTORS Constitutional Law; Court Litigation; Disabilities; Discipline; *Discipline Policy; Due Process; Elementary Secondary Education; Hearings; Home Schooling; Principals; Public Schools; Religious Factors; Religious Organizations; *School Law; *Student Rights; Suspension; *Teacher Rights; *Textbook Content
IDENTIFIERS New York

ABSTRACT

The Capital Area School Development Association, New York, sponsored a school law conference to fulfill a need in the region for school board members and administrators who desire to maintain and improve their knowledge in the area of school law. This document contains the text or outline of the following four presentations: (1) "Preserving Diversity in Our Public Schools: Implications of the Alabama Textbook Case and the Tennessee Testbook Case" (Jay Worona); (2) "Law and Student Discipline" (Gunter Duly); (3) "Constitutional Rights of Teachers and Students" (Melvin H. Osterman, Jr); and (4) "Avoiding the Frustrations of the Education Law, Section 3020-a Process" (Jeffrey M. Selchick). (MLF)

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SECOND ANNUAL LAW CONFERENCE

Proceedings of the Second Annual Law Conference sponsored by
the Capital Area School Development Association (CASDA)

July 16, 1987
Century House
Latham, New York

A publication of the
Capital Area School Development Association
School of Education
University at Albany
September, 1987

Table of Contents

Page

Preface 1

CASDA Executive Committee 2

Presentations:

Preserving Diversity in Our Public Schools: Implications of the Alabama Textbook Case and the Tennessee Textbook Case 4
Jay Worona, Esq., Associate Counsel
New York State School Boards Association

Law and Student Discipline. 34
Günter Duly, Esq.,
Whiteman Osterman and Hanna

Constitutional Rights of Teachers and Students. 74
Melvin H. Osterman, Jr., Esq.,
Whiteman Osterman and Hanna

Avoiding the Frustrations of the Education Law, Section 3020-a Process 108
Jeffrey M. Selchick, Esq., Attorney and Arbitrator

Preface

The Capital Area School Development Association sponsored its Second Annual School Law Conference on Thursday, July 16, 1987. The conference fulfills a need in the Capital Region for school board members and administrators who desire to maintain and improve their knowledge in the area of school law. As a further service, CASDA is presenting these proceedings of the Second Annual School Law Conference for each participant who attended the conference.

We thank the presenters at the Law Conference for supplying us with a full text or outline of their presentations. In the interest of economy and time, the papers have been reproduced as typed and presented to us. We thank each of the four attorneys for their presentation on July 16 and for their written text or outline.

We are happy to present these proceedings to the participants at the conference as another service of the Capital Area School Development Association.

Richard Bamberger
Executive Director
Capital Area School Development
Association

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PRESERVING DIVERSITY IN OUR PUBLIC SCHOOLS: IMPLICATIONS OF THE ALABAMA TEXTBOOK CASE AND THE TENNESSEE TEXTBOOK CASE

Remarks by
JAY WORONA
Esq.
Associate Counsel
New York State School Boards Association

Presented at the

Second Annual School Law Conference

of the
Capital Area School Development Association

Century House
July 16, 1987
Latham, New York

PRESERVING DIVERSITY IN OUR PUBLIC SCHOOLS: IMPLICATIONS OF THE ALABAMA TEXTBOOK CASE AND THE TENNESSEE TEXTBOOK CASE

Remarks by:
JAY WORONA
Associate Counsel
New York State School Boards Association

at the
Second Annual School Law Conference
Capital Area School Development Association
Century House
Latham, New York

July 28, 1987

A question many of you may be asking yourselves as you look at the title of my talk is, what possible implications on New York State public schools can there be from two federal court cases arising in the State of Tennessee or the State of Alabama?" Let me answer this question by making a prediction. In the next few years, many of your districts may either be directly involved in litigation of a similar nature to that of the cases we will be discussing today or will at least be impacted greatly by these decisions. The reason that this is so is that both the Tennessee and Alabama textbook cases as well as another case which I'll touch on today, were not simply initiated by aggrieved parents who had problems with the curriculum of their public schools. Rather, these cases are funded by organizations who have not hidden the fact that their political agenda includes initiation of lawsuits which are aimed at drastically altering our public education system as we know it.

What I am going to do this morning, is provide you with some background information on all of these cases and allow you to see for yourselves just how great their potential impact is on public education. I will also be able to provide you with a personal perspective on these cases because I, on behalf of the New York State School Boards Association am involved in all of these cases.

Let us begin by noting that both the Tennessee textbook case[1] and the Alabama textbook case[2] concern the issue of whether public school districts must accommodate religious-based objections to the public school curriculum by parents. As we go through the facts of both of these cases, ask yourselves whether it is truly possible for the types of religious-based objections to the curriculum which the parents in these cases raise, to be accommodated by the public school system without, at the same time, gravely weakening the diversity of our present educational system.

Let us start by examining the facts of the Tennessee Textbook Case. In this case entitled Mozert v. Hawkins County Public Schools, certain Christian fundamentalist parents have not attempted to ban textbooks from the curriculum. Rather, they

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1. Mozert et. al. v. Hawkins Co. Public Schools et. al., __ F. Supp. __ (E.D. Tenn., Hull, J., Dkt. No. Civ-2-83-401, dated October 29, 1986); __ F.2d __ (6th Cir., 1987); (Docket No. 87-7216).

2. Smith et. al. v. Wallace, __F. Supp. __ (S.D. Alabama, Hand, J.,Dkt. Civil Action No. 82-0544-BH; 82-0792-BH, dated March 4, 1987; __ F. 2d. __.

have requested that their children not be exposed to certain reading materials which they claim are objectionable to their religious belief. To be specific, this case was instituted by seven families-14 parents and 17 children who are funded by an organization called Concerned Women For America. All individuals resided and continue to reside in Hawkins County, Tennessee and are fundamentalist, biblical Protestants, who believe that the bible is the complete and literal word of god. In their view fundamentalist Protestantism is the only true religion, and all other religious systems are false religions.

Early in the 1983 school year, some of the students enrolled in grades 1 through 7 called their parents' attention to certain stories in the sixth grade Holt, Rinehart and Winston basal reading series textbook entitled, Riders on the Earth. The parents then began to review many of the Holt textbooks which they had not done in the past and when they did, they concluded that they had a wide range of objections to the material in the books and the suggested class discussion. They decided that they did not want their children reading the Holt textbooks, and that they did not want them present in the classroom when any of the objectionable material was read aloud or discussed by any other students.

The parents presented a sweeping list of religious objections to the public school reading curriculum. I have provided you with an excerpt from the trial transcript in which many of the parents' objections are set forth. As you can see

from the handout, the parents' objections were not merely limited to the stories contained in the Holt reading series. Rather, their objections were broad based.

They objected to having their children taught to critically think because they feared that perhaps their children may be placed in the position of questioning their own set of beliefs. They objected to their children being exposed to the feelings, attitudes and values of other students, when the views expressed were contrary to their views. They did not want a teacher to ask their children to understand how a character in a story feels or to apply their values to a story in order to decide whether a character in a story did the right thing. They objected to their children role playing, whenever in their view, doing so would "violate scriptural authority."

They objected to their children being exposed to material in which moral dilemmas are posed and/or the child is encouraged to make his own moral judgments because they objected "to teaching that does not define in biblical terms what values the students should accept." They objected to a teacher or story raising the question of whether lying or stealing is desirable or undesirable in a particular context and to stories that do not depict lying or stealing as resulting in punishment or other bad consequences. They objected to the teaching of religious tolerance. Thus, they objected to their children being exposed to the beliefs and practices of other religious groups unless these other religions are presented as false religions. They objected to material

which portrayed Roman Catholicism, Islam, Buddhism, Hinduism, American Indian religion, Chinese religion, Japanese religion, African religion, and Greek and Roman religion, among others. They wanted their children "taught from a Christian perspective" because they said it would cause unacceptable confusion for their children to be exposed to "any type of religious philosophy contrary to the word of God."

An example of the kind of material to which they objected is an excerpt from The Diary of Anne Frank included in the eighth grade Holt reader, Great Waves Breaking. In this story, prior to meeting her untimely demise, Anne Frank, states, "I wish you had a religion, Peter. . .Oh, I don't mean you have to be orthodox or believe in heaven or hell and purgatory and things . . . I just mean some religion." The parents objected to this statement because they said it implies that one religion is as good as another. To them this simply is not true since all other religions are false religions.

Because their religious beliefs affect virtually all areas of their lives, they viewed many matters which are ordinarily regarded as raising only secular issues as religious issues, and objected to their children being exposed to views which conflict with their religious beliefs. They did not want their "children to have a sense of themselves as individuals and participants in a national or world community. They objected to any emphasis on opposition to war and disarmament and to the themes of "planetary problems of pollution, world population, hunger, a [need for]

conservation of resources."

The parents believe that the free enterprise system of Capitalism was ordained by God and thus their children should not be exposed to any material which is critical of either the United States' economic or political system. They objected to classroom discussions of endangered species, gun control, abortion, the role of the military, law enforcement, disarmament and the future of the human race.

The parents also objected to their children being exposed to material whose object is to break down sexual stereotypes. They objected to stories in the Holt textbooks, including stories about Elizabeth Cady Stanton, Harriet Tubman and Eleanor Roosevelt, because they portray the theme of "role reversal-role elimination." They maintained that it "is a violation of scriptural principle to eliminate roles, to do away with any stereotype roles of men and women." Similarly, they objected to "favorable stories about the women's rights movement" or to any portrayal of a woman challenging her husband's authority.

The also objected to the public schools' efforts to teach their children about such contemporary family problems as divorce, death, and suicide. They objected to discussion of family problems, whether their own or other families. They objected to questions which ask children to "relate conversations that they have had with their parents," or which ask them "have your parents ever asked you to be nice to your brothers and sisters, or made them ask you to be nice, tell what happened."

They also objected to questions such as, "[h]ave your parents ever asked you to do something you didn't want to do?"

Finally, the plaintiffs objected to their children being exposed to "any story which describes evolution," to most references to prehistoric animals and to any reference to things occurring millions of years ago, before, in their view, god created the earth.

Often in expressing their objections, the parents objected to the public school reading curriculum if it was not tailored to their view of scriptural authority. They thus objected to their children being encouraged to use their imagination "beyond the limitation of scriptural authority." In this connection, the parents objected to their children being exposed to material which mentions magic or that portrays animals as having human-like characteristics. As a result, they objected to many fairy tales and folk tales and well-known children's literature, including "Rumpelstiltskin" and "The Wizard of Oz." They also objected to their children role playing animal characters in stories in order to appreciate the motivations and perspectives of those characters. The parents did not object to the material taught in the other subjects in the Hawkins County Schools, despite the fact that many of the same themes to which they objected in the reading curriculum are found in the other subjects.

Now that I have provided you with some background information on the specific objections of the parents in this

case, let us discuss the lawsuit which came about.

Upon the initial objections of parents to the Holt series, certain teachers in the district made alternative reading assignments to seven of these children. Shortly thereafter in November of 1983, the school board unanimously adopted a resolution requiring teachers to "use only textbooks adopted by the board of education as regular classroom textbooks." When the students refused, on religious grounds, to read the Holt series or to attend the reading classes in which the Holt series was used, they were suspended from school. As a result of the board's actions, the student and parents sued the district.

Because of time limitations, I will not be able to address every detail of the litigation in this case. Briefly, however, the United States District Court for the Eastern District of Tennessee held that: "[a]lthough the board had chosen to further its legitimate and overriding interest in public education by mandating the use of a single basic reading series for purposes of assuring uniformity, the state's interest in uniformity was by no means absolute. Rather, held the court, "teaching of the reading program may in fact be accomplished through individualized instruction and that uniform, compulsory use of the holt series was by no means essential to furthering the state's goals."

The Court found that providing alternative texts would be an accommodation which could be achieved without substantially disrupting the education process and without substantially

inconveniencing either the students or the rest of the student body. However, the court recognized that there was not one single reading series which would be acceptable to the parents. As a result, the Court found that, "[a] reasonable alternative which could accommodate the student's religious beliefs, effectuate the state's interest in education, and avoid establishment clause problems, would be to allow the students to opt out of the school district's reading program." Under this opt-out program, each of the students would withdraw to a study hall or to the library during his or her regular reading period at school and would study reading with a parent later at home.

Accordingly, the Court enjoined the board from requiring the students to read from the Holt series and ordered it to allow the students to attend the public schools without participating in the course of reading instruction, as long as the parents submitted written notice of their intent to provide home school reading instruction in accordance with Tennessee State law. The Court held that its opinion was not to be interpreted to require the school system to make this option available to any other person or these students for any other subject. "Further accommodation, if they must be made, will have to be made on a case-by-case basis by the teachers, school administrators, board, and department of education in the exercise of their expertise, and failing that, by the court."

The court further determined that the individual defendants were protected from any financial liability to the plaintiffs on

the basis of their qualified good faith immunity, but that the plaintiffs were entitled to a hearing on damages, to be assessed against the school board, for any harm the plaintiffs may have suffered as a result of the board's interference with their first amendment rights.

In a later decision from the District Court, the parents were awarded over 50,000 dollars in damages against the school board to compensate them for having to make alternative educational arrangements.[3] In most cases this meant non-public religious school education. The school district appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit in Cincinnati.

It was at this point that we at the New York State School Boards Association became involved in this case. Contrary to the opinion of the District Court Judge, we did not feel that the decision of the Court in Tennessee was simply confined to the State of Tennessee or to the specific individuals involved in the case. Rather, we felt that the Court's decision would be looked at as a precedent to individuals who had religious-based objections to public school curriculums across the nation. We feared that if this decision was affirmed on appeal, any individual who had religious-based objections to the public school curriculum would look on this decision as a green light for commencing litigation against their public school district.

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[3]. Mozert et. al. v. Hawkins County Public Schools, et. al., No. CIV-2-83-401, (E.D. Tenn. December 18, 1986) (Memorandum and Order).

We entered the case with the permission of all parties and submitted an amicus curiae brief. Amicus curiae translated from the latin, literally means friend of the court. In our brief, we argued that the parents' objections were incompatible with the philosophy of public education in general and were also inconsistent with generally accepted methods of teaching reading.

Major objectives of public education are to prepare each child to be a useful, thinking, discerning citizen of the state and the nation, and to develop the skills necessary to be a good citizen. We who are involved in public education encourage students to consider moral questions, to think critically, to make independent moral judgments, and to be autonomous individuals who can make their own judgments about moral questions. With specific regard to our reading curriculum, we teach students far more than the skills of word recognition and phonics. Reading curriculums cannot be taught in a vacuum. Reading curriculums are part of an integrated program and often material that is introduced as part of the reading lesson is introduced as part of the curriculum of another subject.

School districts cannot meet the state's educational objectives if students are permitted to partially opt out of parts of the core curriculum that they find objectionable. Public education stresses the teaching of values in public schools as an educational objective. If a parent objects to the values that are injected into the public school curriculum but nevertheless chooses to send his child to the public schools,

there is essentially no way to accommodate his objection and at the same time fulfill the state's goals and objectives in educating the child.

As you are aware, values are intertwined in every course that is taught in New York State's public schools just as they are in every course that is taught in public schools across the nation. Keep in mind that the students involved in this case were primarily elementary school children and placing them in a study hall during the time of their reading program was not logistically as simple as the lower court seemed to indicate it was.

In it's opinion, the lower District Court had focused only upon the Hawkins County public schools in balancing the districts' educational concerns and the parents religious requests for accommodation. The court had held that since Hawkins County was a "religiously homogeneous community," accommodating the religious requests of the parents involved in the case was not too onerous. The Court argued that it was doubtful that its decision would serve as a signal to others to sue their school districts.

We argued that, by its decision, the Court had established a geographically variable freedom of religion. Since the First Amendment of the United States Constitution grants all individuals freedom of religion, such a constitutional principle cannot vary depending upon the homogeneity of a community. If in fact the small group of students involved in the Tennessee case

is entitled to First Amendment protection, then it should not make a difference where the live. Under the balancing test employed by the District Court, it is conceivable that a court dealing with a school district located in a large metropolitan area, or one which contains families from diverse religious backgrounds, would find that school district compliance with the myriad number of possible requests for religious accommodations concerning the curriculum, to be impossible. In such event, different federal courts in different regions of the nation or in fact, in the same state, would reach different conclusions with respect to which students are entitled to First Amendment protection even when those students possess the same religious beliefs.

We can only hope that the appellate level federal court will give greater consideration to the implications that the lower court's decision will have on public education in the nation as a whole. If this case is affirmed on appeal, we in New York State will be feel an immediate impact from such a decision. If students have a right to opt-out of any part of the public educational curriculum or from exposure to class discussions in which the viewpoints of others are expressed, we will be precluded from meeting our own educational objective of presenting all students with an understanding and acceptance of all members of our pluralistic society. Furthermore, we will be precluded from ensuring that all students are taught to think logically and creatively and to apply reasoning to issues and

problems in all subjects at all grade levels.

In the State of Tennessee, as in the State of New York, parents have a right to educate their children at home, (subject to certain limitations), as well as they have a right to send their children to private schools. Providing children with the opportunity to opt out of parts of the core curriculum places a greater burden on the public school system than does providing children with the opportunity to totally opt out of the public school system. Since the children involved in the Tennessee case are still considered to be part of the public education system, the school district must still meet the educational objectives which the State of Tennessee has set forth for all public school students, including these students. Furthermore, it would be logistically impossible for public school districts to comply with such an opt-out system.

The lower Court held that administering standardized tests would provide the district with the necessary information regarding whether the state's educational objectives for reading for each child was being met in the home setting. However, since standardized tests are commonly administered late in the school year, even if a district mandates the use of standardized exams, districts will not be able to detect whether deficiencies exist in the student's at home reading program until <u>after</u> the standardized exams are administered. As a result, a child may be placed in the position of losing an entire school year of education in reading, a core part of the curriculum.

On July 9, 1987, I went to Cincinnati, Ohio to hear this case argued before the Court of Appeals for the Sixth Circuit. An opinion is expected before the 1987-88 school year begins.

The issues generated by the Tennessee textbook case have indeed found their way to many states across the nation and New York State is no exception. In a case entitled Blackwelder et. al. v. Safnauer et. al., The New York State Home Instruction Law has been challenged. It is interesting to note that the parents in this New York State case are represented by the same attorney who represents the parents in the Tennessee case. This attorney is Executive Director of a national organization called the Home School Legal Defense Foundation which is funding the case.

In this case, certain parents claim that their First Amendment Right to practice their religion has been violated by New York State's Home Instruction Law. In New York State, parents who wish to educate their children at home are free to do so. However they must first demonstrate to the superintendent of schools in the districts where they reside that they are providing their children with a "substantially equivalent education."

Specifically, in Blackwelder, certain Christian fundamentalists have alleged that current New York State law, which provides superintendents of schools with the legal responsibility of determining equivalency of instruction prior to approving home instruction, is unconstitutionally vague and overbroad in that superintendents are not provided with adequate

standards to determine whether substantial equivalency exists. As a result, these parents claim that the state by and through its superintendents of schools should not question whether substantial equivalency to that of public education exists in the home setting and should simply allow parents who wish to educate their children at home to be immune from the dictates of the compulsory education law. The parents refuse to provide their local superintendents with the necessary information which will allow the proper determinations regarding equivalency to be made. The parents refuse to allow their local superintendents to visit their homes either and claim that home visitations violate their constitutional privacy rights.

If the federal court holds in Blackwelder that the State has no right to determine whether a child is receiving an equivalent education at home, public educators will have lost their responsibility to assure that every child in New York State has an equal opportunity to receive an education which has met the state's standards.

We at the New York State School Boards Association do not concede that enforcement of the New York State Home Instruction Law violates a parents free exercise rights. Rather, we believe that both the Home Instruction Law as well as the Guidelines on Home Instruction from the State Education Department are very clear and were adopted to allow the State to be assured that every child receives an equal chance to be educated in this State. Mandating that parents, who wish to educate their

children at home, comply with certain minimum reporting requirements does not appear to be too onerous a burden and certainly does not rise to the level of being a violation of parental constitutional rights.

In New York State, it is not all that difficult for a parent to educate his or her child at home. New York does not require teacher competency exams for such parents as do many other states.

We have become actively involved in the Blackwelder case and at our initiation, the State Attorney General's Office has entered the case representing the State of New York on the issue of whether the New York State Home Instruction Law is unconstitutional. Hearings are scheduled on this case in mid-September. We have been informed that there are similar home-instruction cases pending in numerous other states including Iowa, Pennsylvania, and South Dakota and all have been initiated by the Home School Legal Defense Foundation.

Let me conclude today's discussion by touching on still another case in which challenges have been made to the public education system. This case is Smith v. Wallace, commonly referred to as the Alabama Textbook Case. In this case, certain Christian fundamentalist parents have been successful in convincing a Federal District Court Judge in Alabama to ban 44 history, social studies and home economics textbooks from being used in the Alabama public schools. The way this case came about is most interesting and quite bizarre.

Many of you may recall that in May of 1982, a lawsuit was commenced in the State of Alabama by a Jehovah's Witness by the name of Ishmael Jaffree. Mr. Jaffree sued the Mobile County school board and various other state and local education officials, seeking to have a certain Alabama law which authorized prayer in public schools declared unconstitutional and to enjoin certain elementary school teachers from leading their classes in prayers and religious songs. Mr. Jaffree asserted that the State's law exposed his child to prayer in school and this violated his constitutional right to practice his own religion. Approximately 600 citizens of Alabama who were in favor of the school prayer law were permitted to come into the lawsuit in support of the school prayer law.

Following a trial, the United States District Court for the Southern District of Alabama, with Judge Brevard Hand presiding, ruled that Alabama's school prayer law was constitutional on the grounds that the First Amendment to the United States Constitution does not prohibit a state from establishing a religion. In his opinion, Judge Hand stated:

> "[i]f the appellate courts disagree with this court in its examination of history and conclusion of constitutional interpretation thereof, then this court will look again at the record in this case and reach conclusions which it is not now forced to reach.. . .If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a deity." Jaffree v. Board of School Commissioners, 554 F.Sup. 1104, 1129 (S.D. Ala. 1983).

Judge Hand's decision was subsequently reversed by the United States Court of Appeals for the Eleventh Circuit, which remanded the case to Judge Hand's District Court for the purpose of entering an order awarding costs to the plaintiffs and enjoining the activities declared unconstitutional. Jaffree v. Wallace, 705 F. 2d 1526, 1537 (11th Cir. 1983). The Eleventh Circuit's decision was subsequently affirmed by the United States Supreme Court. Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

After the case was remanded back to Judge Hand from the appellate level federal court, he did far more than simply deal with the issue of awarding costs to the plaintiffs and enjoining the enforcement of the school prayer law as he was instructed to do. Judge Hand, on his own initiative, realigned the intervening citizen defendants who had been in favor of the Alabama school prayer laws as plaintiffs and dismissed the initial Jaffree plaintiffs thereby initiating a new lawsuit i.e. The Alabama Textbook Case.

In this lawsuit, the plaintiffs challenged 30 elementary school social studies books, 9 high school history books, and 5 high school home economics books -- a total of 44 books of the more than 4000 on Alabama's officially approved textbook list.

The plaintiffs challenged the home economics textbooks on the grounds that the values and decision-making sections of the textbooks allegedly advanced the "religion" of "Secular Humanism" and inhibited theism, particularly Christianity. The plaintiffs claimed that the free exercise rights of teachers, parents and

students, and the free speech rights of teachers were violated by use of the textbooks.

The plaintiffs challenged the history and social studies books on the grounds that they allegedly excluded facts about theistic religion, especially the existence, history, contributions, and roles of Christianity and Judaism. They claimed that this exclusion violated the free exercise rights of teachers, parents and students, the right of students to receive information, and the free speech rights of teachers. They also claimed that this exclusion inhibited Christianity, discriminated against theistic religion, violated a constitutional bar against government disapproval of religion, and violated Alabama law.

The plaintiffs further claimed that use of the contested textbooks was unconstitutional because they advanced the religion of "Secular Humanism."

Prior to the trial of this matter, the plaintiffs reached a settlement agreement with the defendants Governor George Wallace and the Mobile County Board of School Commissioners. A trial involving the plaintiffs, the remaining defendants, Alabama State Board of Education and State Superintendent of Education and the defendant-intervenors was held from October 6-22, 1986.

On March 4, 1987, Judge Hand, in a 111 page opinion, held that certain of the challenged textbooks did violate the Establishment Clause of the First Amendment to the United States Constitution because the books themselves espoused the "religion" of "Secular Humanism", despite the fact that "Secular Humanism"

had never officially been recognized as a religion. In his decision, Judge Hand agreed with the plaintiffs that the religion of "Secular Humanism" elevates man at the expense of god.

It seems obvious what the next step would be in this scenario. If in fact religion is already being taught in the schools, i.e. "Secular Humanism", then prayer in schools should also be allowed. In essence, it appeared that this entire lawsuit was a ploy to get prayer into the schools through the back door. Judge Hand, in the earlier Jaffree case had made his opinion on school prayer statutes very clear.

Judge Hand, in his decision, prohibited further use of certain of the contested books as "primary textbooks, or as a teaching aid, in any course except as a reference source in a comparative religion course that treats all religions equivalently." He ordered the textbooks removed from the state-adopted textbook list and prohibited the Alabama State Board of Education from furnishing the listed textbooks to any school system.

At this point, the New York State School Boards Association became involved in the case. Just as in the cases already discussed, we saw this decision as a direct threat to public education in this country. In this lawsuit, not only were parents asking that their children be excluded from participation in certain courses, but were receiving judicial relief that rose to the level of judicial book banning.

We further saw this case as a threat to the authority of

school boards to either choose or have input in curriculum development decisions. Despite the presence of detailed means of parent and citizen involvement in the Alabama textbook selection process, the plaintiffs failed to use these or other procedures to make their concerns known.

In our brief to the Court of Appeals for the Eleventh Circuit, we argued that if the Court of Appeals affirmed the District Court's opinion, such a decision would impact gravely upon public education.

Upon analyzing the textbooks, we asserted that the textbooks in question themselves do not espouse any religion or inhibit theistic religion. By the uncontradicted testimony of Dr. Paul Kurtz, the only "Secular Humanist" who testified in the District Court, it is evident that "Secular Humanists" themselves disagree with many of the passages in the home economics books criticized by the plaintiffs. Likewise, "Secular Humanists" do not support inaccurate history textbooks that fail to recognize the role of religion. Therefore it follows that the textbooks do not necessarily reflect the teachings of the "Secular Humanist" movement but rather the possible attempt by textbook publishing companies to reflect bits and pieces from a variety of competing schools of thought so as to respond to the influences of various interest groups in society and thereby promote greater book sales. If in fact the plaintiffs are correct that the books inaccurately report history and are "bad" books, it does necessarily follow that these books are unconstitutional and

require the judicially-imposed remedy of removal.

An expert witness for the plaintiffs by the name of Dr. Spykman, testified that because, in his view, the challenged textbooks were not advancing a theistic viewpoint, they must therefore be advancing a "Humanistic" viewpoint. The plaintiffs thus essentially reasoned that all human thought must be divided into two categories - one being religious, and the other being anti-religious. The plaintiffs do not accept that an individual can be neutral toward religion without being anti-religious.

Under the analysis which the plaintiffs set forth in this present case, neutrality toward religion is impossible because everything is either for or against theistic religion, and even silence connotes a message of disapproval. Such a world view renders the religion clauses of the First Amendment meaningless and unworkable. Furthermore, it is precisely government neutrality toward religion that the Establishment Clause mandates.

With respect to the home economics textbooks, it should be pointed out that the plaintiffs objected to these books, not because of their neutrality toward religion or failure to mention religion, as in the case of the history and social studies books, but rather because of their teaching that values are subjective and personal and not God-given. The plaintiffs asserted that the home economics textbooks taught the values of "anti-parentalism." The plaintiffs reached this conclusion as a result of examining some of the home economics textbooks and concluding that the

predominant teaching of the textbooks was that values come from within, based upon feelings of free choice as opposed to from God. The plaintiffs asserted that this teaching advances "Humanism" and is consistent with humanistic psychology.

The plaintiffs further contended that the textbooks inhibited their religion of Christianity because they never specifically said, "make the right choice." The "right choice," according to the plaintiffs, can only be made when a child follows the word of god and is told to do so. The plaintiffs thus asserted that the challenged home economics textbooks introduce another authority other than God and the bible, that of the textbook author, and that where the textbooks undermine the child's faith in god as his source of authority, the child's salvation is put in jeopardy.

It is evident that the plaintiffs have clearly articulated their objection to having their children exposed to <u>any</u> textbooks which provide their children with the opportunity to be exposed to ideas different from their own religious beliefs or of being asked to think critically because doing so may encourage their children to question their own set of beliefs. It is evident that this is so, because the plaintiffs particularly objected to the failure of the home economics books to specifically define "right" and "wrong" in terms of God as <u>plaintiffs</u> see it. In this respect, the objections of the plaintiff parents are very similar to the plaintiff parents' objections in <u>Mozert v. Hawkins County Public Schools</u>, despite Judge Hand's determination that

the present case is "fundamentally different from Mozert v. Hawkins County Public Schools."

If the contested textbooks do state that individuals have certain personal choices available to them, it does not necessarily follow that the plaintiffs' religious beliefs are inhibited. Plaintiffs are free to make their value judgments based upon their own religious beliefs. It is obvious that the only "alternative" which the plaintiffs support is their own religious teachings. A public school's presentation of choices to its students does not inhibit the religion of individuals and if it does, such individuals are not entitled to judicial protection under the Establishment Clause.

The District Court's granting of the relief which the plaintiffs have requested thus places public school districts in a "catch-22" position. If school districts teach children that they are not free to choose their own values but must adopt certain religious values, it appears evident that school districts will have violated the Establishment Clause by inculcating religious teachings to our children. On the other hand, as a result of an affirmance of the District Court's decision, if school districts teach children that, as members of our pluralistic society, they are free to define certain values in their own terms (which may or may not include religious teachings), school districts will be in violation of the Establishment Clause as well as the Free Exercise Clause.

The Supreme Court noted in McCollum v. Board of Education,

33 U.S. 203 (1948), That public schools cannot be expected to remove from the curriculum everything that may be objectionable to some religious group. The state "has no legitimate interest in protecting any or all religions from views distasteful to them," because to do so "we will leave public education in shreds."

Since the plaintiffs' objections to the textbooks were based on general principles of constitutional law, any individual who has religious-based objections to the public school curriculum will be able to look to this decision as granting permission to seek judicial relief at the outset, before even being required to pursue appropriate state administrative remedies. As a result, the role of local school boards of education to respond and/or redress any objections to the curriculum will be circumvented and will be replaced by courts, which are ill-equipped to intervene in such decisions.

This result will have a further dramatic effect upon states such as New York which contain a large population made up of individuals of diverse beliefs, and where the District Court's ruling may open the door for constant attacks on the public schools by members of different religious groups.

An affirmance of the District Court's opinion by the Court of Appeals will further dramatically impact states such as New York in that, in New York State, there is <u>no</u> central textbook list compiled by the state for board members to use and since each board of education <u>itself</u> chooses the textbooks to be used

in its school district, individuals will have far more textbooks to object to.

An affirmance by the appellate level federal court of the District Court's decision will determine that parents or groups of parents do indeed have a right to dictate which textbooks will not be used in public schools based simply upon that parent's or group's disagreement with the contested textbooks.

Furthermore if the appellate level federal court determines that the remedy of book banning imposed by Judge Hand is correct, all public school districts, whether they be in Alabama, New York or elsewhere, will be effectively precluded from providing students with the tools needed to critically think, because school districts will be placed in the position of being mandated to present only one position, that of the plaintiffs. If school boards do not remove textbooks which are objected to on religious grounds, individual board members will risk personal liability for monetary damages under civil rights lawsuits. We argued that this result will produce a chilling effect upon boards of education when they attempt to carry out their legal responsibilities of developing the curriculum.

On June 23, 1987, I attended the oral argument of this case before the United States Court of Appeals for the Eleventh Circuit in Atlanta Georgia. A decision on this case is also expected before the commencement of the 1987-88 school year.

In conclusion, you can see that the issues which these cases raise are complicated ones. They are filled with emotion. If

our public educational system is to survive these challenges, we must again commit ourselves to support the ideals of pluralism on which our current educational system was based and preserve diversity in our public schools.

LAW AND STUDENT DISCIPLINE

Remarks by
GUNTER DULLY
Esq.
Whiteman Osterman and Hanna

Presented at the

Second Annual School Law Conference

of the
Capital Area School Development Association

Century House
July 16, 1987
Latham, New York

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I had a conversation yesterday at the facility where I workout that prompted me to change my opening remarks. I have decided not to tell you one of Bill Mesick's stories and instead tell you that I happened to mention to this other attorney that I was giving a presentation tomorrow. He asked what it was about and I told him "The Law and Student Discipline." There were three other men in the locker room who turned out to be two physical education instructors and an English teacher and they proceeded to give me a scathing rendition of just what they perceived to be the law's attitude towards student discipline. I would share it with you but, after deleting all of the explitives, the only thing communicable in public is a general feeling of frustration, of being constrained and restrained by the

law from meaningfully imposing discipline to maintain order and some measure of authority. They finally calmed down when I told them that the purpose of my presentation was primarily to refresh the audience in protecting themselves from the litigious student, and they left feeling much better after reminiscing about parochial school and how the Brothers had enforced discipline when they were kids.

I start off this presentation by relaying that to you because there is a perception not only among teachers, but among some of the public in general, that there is a breakdown in discipline. There is a perception that schools are not enforcing discipline enough; there is a perception that schools are too strict in enforcing discipline. There is a perception that it is your job to straighten out students while they are under your direction; there is a perception that you are just supposed to teach them academic subjects and leave the rest to the parents. You are the people in the box. On the one hand, you are called on to "prepare pupils for citizenship in the Republic (and) inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" (Bethel School District v. Fraser, 106 Sup. Ct. 3159 [1986]). On the other hand, the only substantial discipline

that the law permits you to utilize to help accomplish that end, when it becomes necessary to do so, is removing the student from school -- and woe to you if you don't dot your i's and cross your t's along the way.

I would venture to say that, unless this is your first day of employment as a school district administrator, each of you has had to deal with a student disciplinary matter before today. Most of you know the ins and outs of Education Law §3214 very well; most of you would probably have a difficult time adding up just how many student disciplinary proceedings you have had to deal with. Ninety percent of the time, they go smoothly; if you made some sort of error in the process, no one picked up on it and there was no impact. My remarks to you this morning are intended to save you the considerable frustration, time, and certainly expense involved in that occasional case where you have made a technical error and someone wants to call you to task for it.

Such a situation occurred very recently to one of our school district clients. A student showed up at school wearing a T-shirt which had emblazoned on it the words "Don't Fuc With Pac." The student wore a jacket over the T-shirt, but later proceeded to take the jacket off,

revealing the lettering on the T-shirt. This was, of course, brought to the attention of an Assistant Principal, who gave the student several options: to go home to change the shirt, to turn the shirt inside out, to take the shirt off or to keep the shirt covered with his jacket for the duration of the school day. The student informed the assistant principal that if it became hot, he would take the jacket off and told him that he was not going to interrupt his instructional day by going home to change the shirt. On two separate occasions during that day, the student did, indeed, take the jacket off and was spoken to by the Assistant Principal. During those conversations, the student started yelling at the administrator, saying that he was being harassed and adding the usual witty and clever cliches students can come up with when in a face to face confrontation with authority.

The student was advised that he should appear with his parent for a Principal's informal conference, scheduled for three days later. The informal conference was held and during the course of it, the student shouted at the Principal that he was going to pay for this and proceeded to storm out of the office, effectively terminating the informal conference. The Principal suspended the student for five days and the district arranged for a

Superintendent's hearing, at the conclusion of which the student was placed on home instruction for 30 days, pending the receipt of a psychological evaluation.

Two weeks later, the Superintendent arrived in our offices and notified us that he had just been served with a civil rights suit seeking $20,000 in damages and attorneys' fees under 42 U.S.C. §1983. Along with the summons and complaint had come an Order to Show Cause containing a temporary restraining order restraining the Superintendent from continuing to enforce the suspension and directing that the student be returned to regular classroom instruction.

What had gone wrong? Nothing that had anything to do with the actual merits of the proceeding. But -- the notice of charge that had been issued to the student had merely stated "insubordination"; the Superintendent had relied upon the student's disciplinary history without prior notification to the student; and, the Superintendent had imposed a questionable penalty in reliance upon a 1972 annotation to McKinney's Education Law §3214 which stated that:

> Subsequent to a determination of a student's guilt with regard to the offense charged, a superintendent may determine on the basis of the student's

> record that psychological evaluation is appropriate and may reasonably require the student to continue receiving home instruction until the psychological evaluation is completed. (11 Ed. Dept. Rep. 327).

As regards the psychological evaluation, the Superintendent had simply not realized that the provisions of statute and regulations dealing with Committees on Special Education may have superseded the annotation which he relied upon in McKinney's.

What to do? We suggested to the client that he rescind his determination as the procedural deficiencies would prove difficult to sustain and the proceeding was already becoming sufficiently costly that we should attempt to curtail the student's demand for attorney's fees. We then prepared a new set of detailed charges and scheduled a new hearing before an independent hearing officer.

The student's attorney thereupon tried, unsuccessfully, to stop the second hearing, first in Supreme Court in Kingston and then in the chambers of an Appellate Division Justice in Schenectady. Ultimately, we held the hearing, the student was suspended for an additional 15 days, a Board level appeal was held and the Board upheld the suspension. The §1983 action is still pending.

Throughout all this, the local newspapers had a field day. The first headline read "Gulag on the Hudson: Psycho-Testing Ordered for Student Dissident." After we rescinded the first determination, another newspaper ran the headline "Schools Throw in the T-Shirt." When we held the second hearing, a newspaper ran the headline "Student Retried in Secrecy." By the time the whole process was concluded, other newspapers had gotten involved and carried less inflamatory stories and headlines. The damage, however, had been done and an otherwise routine student disciplinary proceeding had been converted into a banner headline news item.

Why all the attention to what some of you may perceive as procedural and technical irregularities? A student's entitlement to a public education is a property interest which is protected by the due process clause of the United States Constitution and which may not be taken away for misconduct without adherence to the minimum procedures required by the clause. Goss v. Lopez, 419 U.S. 565 (1975). One concept to bear in mind is that in determining whether due process requirements apply, the courts look not at the weight but at the nature of the interest at stake. So long as the deprivation of the interest is not de minimis, its

gravity is irrelevant to the question whether account must be taken of the due process clause.

I would like to run through the statutory requirements of §3214 and then give you some idea of the pitfalls to avoid in the context of situations in which they have arisen.

The statute provides that a Board of Education or Superintendent may suspend from required attendance upon instruction a student who is "insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others" or "whose physical or mental condition endangers the health, safety or morals of himself or other pupils."

A board of education may adopt by-laws delegating to a Principal of the school where the student attends, the power to suspend a student for a period not to exceed five school days.

A student cannot be suspended for longer than five days unless the student and person in parental relation have had an opportunity for a fair hearing, upon reasonable notice. The student has the right to represented by counsel, to

question witnesses against him and to present witnesses or other evidence in his behalf.

When the student has been suspended by the Superintendent, the Superintendent may personally hear and determine the proceeding or he may appoint a hearing officer to conduct the hearing. If a hearing officer is designated, the hearing officer is authorized to administer oaths and to issue subpoenas. A record of the hearing must be maintained, but a tape-recording is deemed a satisfactory record and a stenographic transcript is expressly not required. The hearing officer must make findings of fact and recommendations as to the appropriate measure of discipline to the Superintendent, who may accept all or part of the hearing officer's report in issuing his determination.

The student may appeal the Superintendent's decision to the Board of Education, which is to make its decision solely upon the record before it. The Board may adopt in whole or in part the decision of the Superintendent.

Where the student has been suspended by a Board of Education, the Board may hear and determine the proceeding, or it may appoint a hearing officer. If it appoints a

hearing officer, the Board may reject, confirm or modify his conclusions, but each member of the Board must, before voting, review the testimony and acquaint himself with the evidence on the case.

Where the pupil is of compulsory attendance age and has been suspended, the school must take immediate steps for his attendance upon instruction elsewhere or for supervision or detention of the pupil pursuant to the Family Court Act.

Examining the statutory requirements in the order which you are called upon to deal with them when a student disciplinary matter occurs, the first step is the Principal's informal conference. Note that it is only a Principal that may be delegated the authority to suspend a student for a period of up to five school days. The Commissioner of Education has held that there cannot be any further delegation of the power to suspend; thus, a suspension imposed by a lesser administrator will not stand up on appeal. Matter of Watson, 10 Ed. Dept. Rep. 90 (1971). In Matter of Lawler, 11 Ed. Dept. Rep. 261 (1972), for example, a suspension imposed by an Assistant Principal resulted in the expungement of a student's suspension from his records after an appeal to the Commissioner. Note also that the by-law by which the Principal is delegated

authority to suspend must be sufficiently specific. In a recent Third Department Appellate Division case, Underwood v. Board of Education, 498 N.Y.S.2d 907 (1986), the Court held a Principal's suspension improper where the by-laws merely read "For pertinent information refer to Section 3214(3)(b) of the Education Law."

The school district has to notify the student and the person in parental relation to him of the opportunity for an informal conference. The statute does not require that the informal conference must be scheduled, however, before the beginning of the suspension. Matter of Durkee, 20 Ed. Dept. Rep. 94 (1980).

Nor does the statute require that a stenographic record or tape-recording be kept of that informal conference. We suggest, however, that the Principal have another administrator present during the informal conference and that he write a synopsis of the conference afterwords to have on hand should it become necessary to recreate the diologue that transpired at that conference. As many of you have no doubt already experience first hand, disciplinary proceedings can become lengthy and emotionally-laden affairs, often taking on a life of their own or certainly a character that is an exaggeration of what actually

transpired along the way. Having an additional witness present and being able to effectively and dispassionately recreate each step can dispel the later aura attached to the matter and demonstrate the businesslike manner in which it was conducted.

The statute provides that the parent is authorized to ask questions of complaining witnesses at the Principal's informal conference. The Commissioner has invalidated a suspension where the parent requested an opportunity to question faculty members who saw the student engage in the conduct and was denied that request by the Principal. Matter of Wright, 18 Ed. Dept. Rep. 432 (1979). See also, Matter of Inman, 15 Ed. Dept. Rep. 506 (1976), where the Commissioner remanded the matter to the district with the direction that it grant the parent's request and then determine, taking into account the response of the requested witness, whether the suspension should be annulled.

If you want to suspend the student for longer than five days, you have to schedule a "fair hearing." Is there a statutorily mandated time within which you must commence this hearing? The statute provides that "no pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil

shall have had an opportunity for a fair hearing, upon reasonable notice . . . " This does not mean you have to have the hearing within five days of the start of the initial suspension. But don't forget that the principal can only suspend for a maximum of five days. If you schedule the hearing beyond the five-day period, technically, the student should be re-admitted to classroom instruction pending the hearing; if he isn't, the student could secure an order from the Commissioner or more likely, the courts, compelling his reinstatement pending the hearing. Matter of Cousins, 10 Ed. Dept. Rep. 245 (1971).

Incidentally, the statute also requires that where the suspended student is of compulsory attendance age, "immediate steps" shall be taken for instruction elsewhere. This applies not only to a suspension after a hearing, but also to a suspension issued by a Principal. Turner v. Kowalski, 49 A.D.2d 943 (2d Dept. 1975). How immediate is immediate? In Matter of Kulik, 20 Ed. Dept. Rep. 134 (1980), the district arranged for alternate instruction on the fourth day of the student's suspension. In his decision on the ensuing appeal, the Commissioner stated that the term "immediate" does not mean instantaneously, but that "a school district should act reasonably promptly, with due regard for the nature and circumstances of the particular

case." That language doesn't really afford any greater insight into what is meant by "immediate," but the Commissioner's next statement does lend a clue: the "delay of four days in providing alternate instruction was not reasonable, and respondent is admonished to promptly provide alternate instruction in the future for suspended students." You thus know that you should provide for the alternate instruction quicker than four days from the effective date of the suspension.

You have decided that you want to suspend the student for longer than five days. You must hold the hearing, whether the student or parent demands it or not. Johnson v. Board of Education, 90 Misc. 2d 40 (Sup. Ct. Nassau County 1977). What is the "reasonable notice" that you have to provide? We try to schedule a hearing a week or ten days in advance to permit the student to get legal representation and, then, often accommodate a reasonable request for an adjournment to permit the student's counsel to meet with him and to prepare a defense. Anything short of that gives the appearance that the school is running roughshod over the individual student and invites a court proceeding. In Matter of Carey v. Savino, 91 Misc. 2d 50 (Sup. Ct. Alleghany County 1977), for example, the court annulled the results of a hearing and remanded to the Board of Education

to conduct a new hearing where the student had been advised of the fair hearing only the night before it was to take place.

When you schedule the hearing, you obviously need to serve a charge or charges upon the student. Can the district properly issue a notice of charges that states that the student engaged in, for example, insubordination? The answer, as I have already indicated, is "no." The Commissioner has frequently held that:

> Mere repetition of the statutory language concerning the grounds upon which a pupil may be suspended is insufficient to afford the student reasonable notice of the charges against him. Matter of Dennis, 19 Ed. Dept. Rep. 235 (1979).

If you can't just restate the statutory language as a charge, how specific do you have to make the charges? Charges in a student disciplinary hearing need not be as specific as those required in a criminal proceeding, but they must be sufficiently detailed to inform the student and his counsel of the incidents or conduct which gave rise to the proceeding and which will be the basis for the hearing. It is not a major undertaking to draft sufficiently specific charges and it by no means requires an attorney: just make sure the charges say who did what, when and where. If you

take the time to do that, you should feel comfortable that the charges are sufficiently specific to withstand an administrative or judicial challenge and you will have already gone a long way towards organizing your proof at the hearing.

Dealing with a student's anecdotal record, his history of prior disciplinary infractions, is a lurking stumbling block in a great number of student disciplinary proceedings. Numerous districts have found themselves in the uncomfortable position of going through these proceedings, spending time and expense in appeals before the Commissioner or the courts and having their determinations annulled because of improperly handling the student's anecdotal record in the course of the hearing.

The only recognized and legally sound procedure to employ is to take everything in steps. To impose discipline upon a student, there must be specific misconduct upon which the discipline is based and reasonably certainty that the student engaged in the misconduct. Deal with that first. Once a determination is made that the student engaged in the misconduct, then it is appropriate to consider what penalty should be imposed. Obviously, the student for whom this is a first infraction should receive a lesser penalty than the

student for whom misconduct has become a way of life. Accordingly, it is appropriate to consider the student's anecdotal record in determining the appropriate penalty. And, just as it is appropriate to consider the anecdotal record in determining the appropriate penalty, it is, likewise, appropriate for the student or his counsel to rebut the content and effect of that record.

It is not, however, appropriate to consider that record in determining guilt or innocence on the charge on which the student is subject to the proceeding. You cannot say because he did these things in the past, he probably did this one, too. But, you have to notify the student or his attorney in advance of the hearing that you are going to consider his anecdotal record. Matter of Dennis, supra.

We suggest that you do this as part of the correspondence accompanying the notice of hearing and statement of charges. By preparing a separate sheet listing those prior disciplinary infractions which you intend to rely upon at the hearing for purposes of determining an appropriate penalty, you satisfy the obligation imposed by statute, you perhaps save yourself having to respond to a request for an adjournment from the student's attorney and, perhaps most significantly, you don't forget to do it

later -- you don't have to worry about it -- you already did it.

When we prepare charges for one of our district clients, we provide notification as follows:

> Please be advised that the hearing shall consist of two parts. Part one will determine whether you are guilty or innocent of the charges stated above. If you are found guilty, part two will determine you punishment. In making that determination, the hearing officer will review your academic and attendance record and your disciplinary record, a summary of which is attached to this letter.

The day for the hearing arrives. Whether the Superintendent conducts the hearing, or a designated hearing officer conducts it, we suggest you follow a certain procedure to insure that the hearing is, indeed, a "fair hearing." If you are the officiating hearing officer, we suggest you mark as Board Exhibit One, a copy of the charges against the student and as Board Exhibit Two, a copy of the affidavit of mailing of the charges. Ask the student if he received a copy of the charges and has had an opportunity to review them. Indicate that the purpose of the hearing is to determine whether or not the student is guilty of the charges and, if so, the penalty to imposed upon him. That penalty may range from a suspension for one day to a

permanent suspension from instruction. Ask the student if he is guilty or innocent of the charges. If he professes innocence, ask whether he is prepared to proceed with the hearing. If he indicates guilt, ask whether he understands he is waiving his right to a hearing on the merits of the charges and that the only issue left will be the penalty to be imposed. Ask if anyone has threatened him or made any promises to induce him to plead guilty and ask whether he has consulted with his parents or, of course, his attorney. We strongly suggest that, even if the student pleads guilty, the administrator prosecuting the matter briefly present evidence into the record to demonstrate the student's guilt.

If the student pleads innocent, indicate the two-step nature of the hearing. State that the administrator will present whatever evidence he may have and call whatever witnesses he may have. Indicate that all witnesses will be sworn. State that at the conclusion of each witness' testimony, the student or his attorney will have the opportunity to ask questions of that witness. State that after the administrator has completed his case, the pupil will have an opportunity to present any witnesses or evidence he may have. Opening statements are always appropriate, and opportunities should be afforded to first the administrator and then the student's representative.

The administrator puts in his proof first, and each witness is subject to cross-examination by the student's representative, followed by redirect-examination by the administrator. After the administrator rests his case, the student should be offerred an opportunity to present his witnesses and evidence. Thereupon, the administrator is given the opportunity to present rebuttal testimony or evidence. At the conclusion of both parties' cases, the administrator and the pupil should be offerred the opportunity to make a summation, with the pupil going first. The hearing officer should then indicate that he will retire to make his determination on the question of guilt or innocence and ask each party whether they have any additional facts they want him to consider. If the hearing officer returns with a finding of guilt, he should indicate that the next phase of the hearing is to present witnesses and testimony concerning the penalty to be imposed. The hearing is then concluded after that phase is completed and the hearing officer makes his determination, in writing, as to the appropriate measure of penalty to be imposed upon the finding of guilt.

Section 3214 requires that a record of the hearing be maintained. The statute specifically provides that a

stenographic transcript of the hearing is not required and states that a tape-recording is a satisfactory record.

Nonetheless, numerous appeals revolve around, or involve as an issue, the inadequacy of the record. The record must be "intelligible and complete" to permit review by the Board of Education and perhaps by the Commissioner of Education, Matter of Rose, 10 Ed. Dept. Rep. 4 (1970). In Matter of Labriola, 20 Ed. Dept. Rep. 74 (1980), the Commissioner indicated that "an intelligible verbatim transcript of student disciplinary hearings must be kept in order to permit a meaningful review of the hearing." Essentially, it is a matter of judgment in each particular student disciplinary proceeding whether you foresee a need to go through the several hundred dollar expense of having a court stenographer present to make a transcript. If you have a student and a situation that you feel comfortable will not require further proceedings, then the expense is probably not merited. If, however, you have a sense that the hearing will be appealed and will involve review by the Commissioner or the courts, we strongly suggest that you do have a stenographic transcript. Not only does it expedite the review process, it lends gravity to the quasi-judicial nature of the entire proceeding.

If you have made a transcript from a tape recording of the hearing, do you have to provide a copy of that to the student's representative? The Commissioner has held that you do not. Matter of Vassar, 22 Ed. Dept. Rep. 284 (1982).

You do, however, have to afford the student access to the tape-recording of the hearing, presumably to make his own transcript. We suggest that, if you have made a stenographic transcript, arrange for the court reporter to send a copy to the student's attorney as this would be the sole record and as there is no way for the student's representative to independently produce it.

The next step is usually an appeal by the student to the Board of Education. Section 3214 provides that

> An appeal will lie from the decision of the Superintendent to the Board of Education who shall make its decision solely upon the recored before it.

What does that mean? That means that the Board must schedule a time and place to hear the oral argument of the student's representative as to why it should annul or modify the Superintendent's determination. It is not another full blown fair hearing with witnesses and exhibits. Rather, it a process whereby the Board is to review the transcript and

exhibits of the hearing held and determine whether, from that record, there is sufficient evidence to find that the student engaged in the activities with which he is charged and, if so, whether the measure of discipline imposed by the Superintendent is appropriate. Matter of Holfener, 14 Ed. Dept. Rep. 375 (1974).

Please note that the Board members must each individually review the entire record - the transcript and exhibits. We advise our Superintendents to have sufficient copies made so that each Board member has one for the appeal. We show counsel for the student a copy of the record and, then, in his presence, have it passed out to each of the Board members.

Anything short of that will just get you in trouble. For example, in Matter of Ehrhart, 18 Ed. Dept. Rep. 339 (1979), the Board only heard excerpts from the hearing officer's findings and recommendations as read to it by the Superintendent. In the resultant appeal to the Commissioner, the Board admitted that it had not reviewed the actual transcript and the Commissioner ordered the student reinstated pending the Board's making a full review on remand to it.

At the Board level appeal, the Superintendent serves as an advocate of his own determination, not as an advisor to the Board. We strongly adhere to maintaining the appearance of propriety just as much as maintaining propriety itself. To accommodate both, we advise that the Superintendent not participate in the deliberations of the Board on the appeal. This applies to other school administrators or faculty members involved in the hearing as well. In Matter of Vassar, 22 Ed. Dept. Rep. 284(1982), the complaining teacher had remained after the hearing to meet with the Board of Education, presumably on other matters unrelated to the hearing. The Commissioner indicated that it was "improper" for the complaining teacher to have done so and "admonished" the Board of Education "to avoid such appearances of impropriety in the future."

Questions sometimes, although recently more rarely, arise regarding what type of conduct is subject to discipline under the statute. The statute permits suspension of a student if he is insubordinate or disorderly or his conduct endangers the safety or welfare of other students or if his presence at school, by virtue of his physical or mental condition, endangers the health, safety or morals of himself or his fellow students.

The issue of off-premises conduct, particularly criminal conduct, sometimes arises with student disciplinary proceedings just as it does with teacher disciplinary proceedings.

As I am sure you are aware, there must be a nexus of the off-premises conduct to the school administration, faculty or students. Whether a sufficient nexus exists and what that nexus need be has often been a point of contention. In Matter of Pollnow, 21 Ed. Dept. Rep. 291 (1981), a student was suspended for assaulting the mother of one of his high school friends in her home during a school recess. The student had beat her and attempted to stab her. Upon the student's return to school from the recess, the Superintendent questioned him about the incident and he admitted to having smoked marijuana apparently laced with angel dust and then having gone to his friend's house where he went "crazy."

The Commissioner ordered reinstatement of the student to regular classroom instruction, finding that the statute was not meant to empower school officials to punish students for actions unrelated to the school and that the assault was properly subject to the pending criminal proceedings against the student.

The Pollnows, incidentally, then brought a civil rights action against the Superintendent for $15,000 actual damages and $75,000 punitive damages and against each individual Board member for $10,000 actual damages and $20,000 punitive damages. Pollnow v. Glennon, 594 F. Supp. 220 (S.D.N.Y. 1984), aff'd, 757 Fed. 2d 496. (The Court eventually dismissed the civil rights action and, in so doing, indicated a different attitude towards the ability of the school administrators to discipline the particular student.)

Several months after the first incident, the same student consumed a quantity of alcohol and assaulted two students, again off school premises and during a school recess, choking one girl and punching a boy in the jaw. Anther hearing was held and another suspension was imposed. When the matter came before the Commissioner this time, however, (22 Ed. Dept. Rep. 547 [1983]) he determined that the student's conduct endangered the safety, morals, health or welfare of others and dismissed the appeal, citing from Matter of Rodriguez, 8 Ed. Dept. Rep. 214, 216 (1969) that:

> The mere fact that such conduct occurs or such conduct exists outside the school situation or the school official-pupil relationship does not preclude the possibility that such conduct or condition may adversely affect the educative process or endanger the health, safety or morals of pupils

> within the education system for which the school authorities are responsible. The school authorities are in the best position to determine whether the education system for which they are responsible has been or could be so affected, and their determination will not be upset absent some showing that they have abused their discretion in making it.

Thomas v. Board of Education, 607 F. 2d 1043 (1979) is an interesting case which came out of the Granville Central School District. There several students published a magazine lampooning school lunches, cheerleaders, classmates and teachers which was, as they described it on the magazine's cover, "uncensored, vulgar, immoral." Almost all of the work on the magazine was done off school premises and each issue was sold off school premises. The Junior-Senior High School Assistant Principal discovered the existence of this publication and spoke to one of the students cautioning him to refrain from mentioning particular students in the publication and to keep it off of school grounds. Eventually, the President of the Board of Education learned of the paper's existence through her son. She met with the Superintendent and Principal, indicated her dissatisfaction with their inaction and suggested convening a Board meeting to discuss the matter. The Superintendent telephoned each of the students' parents and invited them to attend the school Board meeting. Subsequently, the Principal and

Superintendent suspended the students for five days, segregated them from other students during study hall period, eliminated all of their student privileges and included a suspension letter in their school files.

The students then brought a civil rights action against the Superintendent, Principal and each of the Board members. The District Court found that the students' activities fell within the scope of a school regulation adopted pursuant to §3214. On appeal, the Second Circuit Court of Appeals reversed and remanded, premising its decision primarily upon the axiom that speech may not be suppressed nor any speaker punished unless a final determination that specific words are unprotected is made by an impartial, independent decision maker. The Court pointed out that all but an insignificant amount of relevant activity was deliberately designed to take place beyond the schoolhouse gate and that any activity within the school itself was de minimis. The Court noted that because the school administration had

> . . . ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena. 607 F.2d 1050.

The Court noted that the district had consistently disclaimed any desire to punish the students for off-campus expression and concluded that, on the facts before it, there was simply no threat or forecast of substantial disruption within the school as a result of the students' conduct, aside from the Board President's shock and the predictions of the administrators once the lawsuit had been commenced. The concurring opinion of Circuit Justice Newman is particularly interesting as he centered upon that part of the District Court's ruling which rejected the students' demand for the right to distribute their publication on school property. His analysis was affirmatively cited by the U.S. Supreme Court in Bethel School District v. Fraser, 106 Sup. Ct. 3159 (1986). If you will recall, Bethel School District was a case dealing with the nominating speech made by a student wherein the United State Supreme Court held that "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." 106 Sup. Ct. at 3165. Had the record in Thomas been developed differently, I suspect the outcome would have been different. In our T-shirt case which I made mention of before, we relied quite heavily upon the Bethel School District decision as it was on all fours with the student's conduct at hand, occurring as it did in the school itself. I commend both cases to you for

discussion of the factors which a court will consider in evaluating the appropriateness of disciplinary action for conduct which involves speech on or off school premises.

Every now and then a situation arises involving a student who is or may be handicapped. There are essentially two rules to follow and I leave it to you to apply those rules to the particular student situation that you may have to deal with. A student may not be disciplined for misconduct which is related to his handicapping condition. This can become a difficult situation, as some of you have no doubt experienced. A school that has reason to believe a student's conduct is engendered by and a manifestation of a handicapping condition is required first to follow the procedures established relative to evaluation by a Committee on Special Education. If that evaluation concludes that the child is not handicapped, the district can then proceed with disciplinary measures under §3214. Matter of Child Suspected to be Handicapped, 21 Ed. Dept. Rep. 94 (1981). The fact of a handicapping condition does not necessarily afford an immunity to a handicapped student from §3214. Thus, there is no prohibition against the suspension of a child who may be handicapped in situations where his continued attendance in school endangers other children. Matter of Cobb, 19 Ed. Dept. Rep. 107 (1979). However, the

suspension of a handicapped child which continues until it reaches such a duration that it constitutes a change in the child's educational placement would violate the Education of the Handicapped Act. Sherry v. New York State Education Department, 479 Fed Supp. 1328 (W.D., New York 1979). Be aware that when you are dealing with a handicapped child, your options may frequently be extremely limited and that your action must take into account the procedures of the Education of the Handicapped Act. (21 U.S.C. §1415).

The penalty imposed pursuant to a student disciplinary proceeding must be proportionate to the severity of the conduct engaged in by the student. The Commissioner will not substitute his judgment for that of the district so long as the penalty is not so disproportionate to the offense as to be shocking to the conscience. Frequently, districts are tempted to reduce students' grades as a means of imposing discipline, by-passing §3214 altogether. Such discipline will, almost invariably, be overtuned on an appeal. The Commissioner has frequently stated that there must be a reasonable relationship between the misconduct (and in this context, it is usually absenteeism) and the sanction imposed. A grade reduction for absenteeism has been held to constitute arbitrary and unreasonable conduct where it was not premised solely on conduct which affected the student's

academic performance or on the student having failed to complete classroom work which formed the basis for the student's grade. Matter of Moller, 21 Ed. Dept. Rep. 188 (1981). Thus, a percent of grade reduction for each day of unexcused absence was invalidated in Matter of Caskey, 21 Ed. Dept. Rep. 138 (1981), because those students that did attend classes did not have that specific percentage of their grade determined by their classroom performance on that day.

If you want to discipline the student for excessive absenteeism, follow the statute and do it right.

Another question that comes up with some frequency, is whether a school can preclude a student from participating in a graduation ceremony. I know I have discussed this with several of you just in the last few months. In Ladson v. Board of Education, 67 Misc. 2d 173 (Sup. Ct. Nassau County 1971), a high school senior had been suspended, placed on home-tutoring for the balancing of the school year and directed to pick up her graduation diploma at the Principal's office rather than at the regular graduation ceremony.

The student, by her mother, brought an order to show cause in Nassau County Supreme Court to permit her to attend graduation. At the appearance before the court, the Board of Education argued that the student had not exhausted her administrative remedies before applying to the Court as she had not yet appealed the Superintendent's suspension determination to the Board of Education. The court accommodated the Board's argument and directed that the Board hold a special meeting the hear the student's appeal. Two days later the Board meet, heard the student's appeal and confirmed the Superintendent's determination. Back everyone when to court. The court then held that §3214 limits suspension of students "from required attendance upon instruction"; that the presence of students at the graduation ceremony was not "required attendance" nor was it for purposes of instruction, as at that point all course requirements had been completed. The court did find that a Board has the power to regulate attendance at graduation if there were sufficient reason that suppose that the presence at the ceremony of a particular student would cause an upset or disruption of the ceremony, but the court found that this particular student posed no such threat.

We would suggest, therefore, that §3214 provides no basis for precluding a student from attending graduation

ceremonies and, indeed, that such an exclusion is not an appropriate penalty under §3214. The question can, safely, only be answered in the specific context of a particular student and must be based on the history and nature of the particular student's disciplinary infractions and whether the supposition can naturally be drawn with some degree of certainty that the particular student will disrupt the graduation ceremony. In most instances, I would suspect that you cannot reach that conclusion. In any event, be aware that you may be inviting the time and expense of a court proceeding if you include exclusion from graduation as part of the penalty in a disciplinary proceeding.

Lastly, the question frequently arises as to how you deal with suspensions from extracurricular activities.

The Commissioner has held that suspension or preclusion from participation in interscholastic sports, for example, is not a deprivation of an education right or a property right and is distinguishable from disciplinary actions such as suspension from an academic class. Matter of Mungioli, 21 Ed. Dept. Rep. 364 (1981). Thus, a coach can drop a student from a sport without bringing the full panoply of a due process hearing into play.

However, the Commissioner has also held that basic fairness requires that the student and his parent be given an opportunity to discuss the factual situation underlying the suspension from the extracurricular activity. Matter of Clark, 21 Ed. Dept. Rep., 542 (1982). That discussion should be with the person or body authorized to impose discipline. Offering the student and parent a conference to discuss the matter with the Principal as well as the coach involved, for example, should serve to satisfy the student's due process safeguards. The informal conference will serve to ensure that the suspension from extracurricular activity was imposed with a reasonable degree of certainty that the student was the perpetrator of, or otherwise participated in, some conduct for which the suspension imposed is an appropriate punishment. The informal conference also serves to afford the student a decision by someone other than a staff member directly involved.

I am sure that other circumstances have arisen presenting additional questions for you to deal with than those which I have attempted to cover today. I would like to leave you with one idea to carry back to your districts and that is, the next time you are confronted with a student disciplinary problem, map out your procedure on paper. If a Principal advises you that he is going to or has suspended a

student, calendar the five days. If the student is of compulsory attendance age, make sure you provide instruction elsewhere to commence as soon as the student is suspended. Make sure that the Principal affords the parents an opportunity for an informal conference. If you are going to seek a suspension for longer than five days, draft a set of charges outlining specifically what it is that you are going to show that the student did. In your notification to the student and his parents, advise them that you are going to rely on the anecdotal record and annex a synopsis of that record, indicating that it will be available for review by the student's representative. Arrange for a verbatim transcript of the hearing, either by tape recording or, if you think that the matter is not going to end after the hearing, by a court stenographer. Outline what proof you are going to present at that hearing and who you are going to use to present it. If you go through this kind of a process on paper, you should effectively prevent any oversights which may leave you vulnerable in any subsequent legal proceedings challenging what it is that you did. You know, better than anyone else, that that is one additional headache you do not need.

THE LAW AND STUDENT DISCIPLINE

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Matter of Mungioli, 21 Ed. Dept. Rep. 364 (1981)
Matter of Clark, 21 Ed. Dept. Rep. 542 (1982)

CONSTITUTIONAL RIGHTS OF TEACHERS AND STUDENTS

Remarks by
MELVIN H. OSTERMAN, JR.
Esq.
Whiteman Osterman and Hanna

Presented at the

Second Annual School Law Conference

of the
Capital Area School Development Association

Century House
July 16, 1987
Latham, New York

CONSTITUTIONAL RIGHTS OF TEACHERS AND STUDENTS

Remarks of Melvin H. Osterman, Jr.

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When Dick Bamberger and I met in April of this year to discuss the subjects which might be covered in this program, Dick suggested there would be interest in an overview of the constitutional rights of teachers and students in the public schools.[1] I responded with some confusion. I suggested that if school district administrators or board members saw this topic on the program, their response was likely to take one of three forms:

> (a) They don't have any constitutional rights or
>
> (b) I don't care if they have any constitutional rights or
>
> (c) how can I get around any constitutional rights they may have.

Dick, however, persevered and, as you can see, I have been assigned the task of presenting this part of the program.

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[1] I express my thanks to Dina Clemens, a law clerk associated with my firm for her work in pulling together the basic research which led to this paper.

I. 1983 Actions

In preparation for these remarks, and with recognition of my initial concerns, I first thought about of why you should care about the constitutional rights of teachers and students. My first reaction was that you would care because you are hard working, honest and law abiding public officials. That of course is true, but it is also somewhat simplistic. A more practical response is found in 42 United States Code Annotated, §1983. That section provides, in part:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects or causes to be subjected any citizen of the United States or any other person from the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. §1983 authorizes the so-called §1983 Action.

We have not seen many 1983 actions in the Capital District. You can, however, compare it to a plague which first broke out in New York City and on Long Island and which now is proceeding apace up the Hudson River. Section

1983 actions are a way of life in the New York City metropolitan area, and, I submit, they soon will become familiar to all of us in public education in the Capital District in the next several years.

There are a number of peculiarities to a 1983 action.

A. Jurisdiction

Although section 1983 is a Federal statute, the action it authorizes may be brought in either a State or Federal Court.

B. Attorney Fees

As you know, it is a general rule of American law that an award of damages to a winning party in a law suit may not include an amount for attorneys' fees. That is not true in a §1983 action. As matter of statute, in a 1983 action attorneys fees expressly are authorized. A defendant in the 1983 action, unlike a normal litigation, often finds himself with two plaintiffs: the party who is actually suing him, and his or her lawyer. Too often the lawyer is a real party in interest. The availability of attorneys' fees against a defendant frequently will encourage lawyers to bring

lawsuits which otherwise would not be brought, simply because the plaintiff could not afford the attorneys' fees. In substance, section 1983 authorizes a form of contingent fee litigation, where the lawyer is looking to the defendant, rather than his own client, for payment of his or her fees. It is not unusual in a 1983 action for the attorneys' fees to equal or even exceed the amount of damages actually awarded.

C. Punitive Damages

A third intriguing facet of §1983 actions is the availability of punitive damages to a successful plaintiff. In one 1983 action in which we represented a school district, a student was seeking $10,000 in compensatory damages and half a million dollars in punitive damages. I do not suggest that the district will be required to pay anything like a half million dollars, but the claim adds a certain piquant quality to the lawsuit.

One interesting sidelight is that punitive damages are not available against a municipality. They are, however, available against municipal officers and that will include school district administrators and board members. I also suggest that it is unlikely that your insurance liability

policy will cover that portion of the action that seeks punitive damages. You may be well served to have your school attorney at least monitor your insurance carrier's representation of the District in a 1983 Action.

D. Privilege

All is not lost in such a lawsuit, and this brings us back to the purpose of this presentation. After a period of uncertainty, the Supreme Court of the United States in Harlow v. Fitzgerald has held that government officials are entitled to a qualified immunity in damage suits brought under §1983, without the need for extensive judicial inquiry as to their motives. School officials will be liable for conduct "which violates clearly established statutory or constitutional rights of which a reasonable person would have known." The knowledge of a reasonable man, rather than your specific knowledge, is the critical factor in determining the scope of your immunity.

This may cause some of you leave immediately. The language of the Supreme Court seems to suggest that your ignorance of the law is a good thing. Unfortunately, it probably is not that simple. As a public official, you are

required to have at least some basic understanding of the constitutional rights of both teachers and students. It is my hope in the next thirty minutes or so to at least touch on some of these rights, at least to create a mental bell which may ring should a specific situation arise.

As you know, the Bill of Rights to the United States Constitution, most of which are replicated in the New York State Constitution, consists of ten amendments. The Ninth Amendment has been found, at least temporarily, by the Supreme Court of the United States to confirm a woman's right to an abortion. I hope and doubt that this is one you will see frequently in a school context. The amendments you are most likely to encounter are the First, guaranteeing freedom of speech and freedom of religion, the Fourth, prohibiting unreasonable searches and seizures, and the Fourteenth, guaranteeing due process of law. Issues under all three of these amendments have been litigated frequently before the courts and, fortunately, the Supreme Court of the United States has given us some substantial guidance.

II. First Amendment Cases

A. Teachers

The leading case with respect to First Amendment rights of teachers is Pickering v. Board of Education, a case decided by the Supreme Court of the United States in 1968. There Pickering, a high school teacher in Will County Illinois, was dismissed from his position by the board of education for sending a letter to a local newspaper in connection with a proposed tax increase. Pickering's letter was critical of the way in which the board and the superintendent of schools had handled past proposals to raise new revenues. The board, in dismissing Pickering, found that publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and that the "interests of the schools required his dismissal." The board found that Pickering's letter had unjustifiably impugned the motives, honesty, integrity, truthfulness, responsibility and competence of both the board and school administrators. The board also found that his letter contained false statements which damaged the professional reputations of members of the board and school administration.

The Supreme Court overturned Pickering's dismissal. It found that the question whether a school system requires additional funds is a matter of legitimate public concern, on which the judgment of the school administration, including the school board, cannot be taken as conclusive. On such a question, free and open debate is vital to informed decision-making by the electorate. Teachers, as a class, according to the Court, are the members of the community most likely to have informed and definite opinions on how school funds allotted to the operation of the school should be spent. [Some of you may question the validity of this premise.] Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliation. The Court concluded a teacher has a First Amendment right to speak out on issues of public importance and that such speech, even if inaccurate, may not furnish the basis for his or her dismissal from public employment.

There are some qualifications to the broad holding in Pickering. The Court expressed no opinion as to what its decision might be if it could be concluded that the statements in Pickering's letter, rather than being merely inaccurate, were uttered by him knowledge of their falsehood or with some malicious intent. The Court also reserved judgment on whether a school district might reasonably

require a teacher, before going public with a complaint, to express his or her views through some carefully drawn grievance procedure. The Court also suggested that its views might be different in a situation in which the need for confidentiality is so great that even correct public statements might furnish permissible ground for dismissal. Finally, the court suggested that there are some positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them.

These exceptions were explored by the Supreme Court in Rankin v. McPherson, decided on June 24, 1987. There a 19 year old deputy sheriff, in a private conversation with a co-worker, after hearing of an attempt on President Reagan's life, was heard to say, "If they go for him again, I hope they get him." In overturning his discharge, the Supreme Court stated:

> Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal. We cannot believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is

> equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency. At some point, such concerns are so removed from the effective function of the public employer that they cannot prevail over the free speech rights of the public employee.

Pickering was extended in Texas State Teachers' Association v. Garland Independent School District, to strike down an effort to restrict teachers' efforts to discuss union matters during non-class time or from using school facilities for union business.

There a policy of the school district prohibited any employee organization from meeting or recruiting during school hours or from using school communication facilities for the dissemination of information concerning employee organizations. Unions were permitted to meet on school district premises before 8:00 a.m. or after 3:45 p.m. It was undisputed that the district, however, permitted access to school communication facilities to other commercial and civic organizations.

The district contended that its school facilities were not a "public forum" and that the union had no right of access. It suggested that reasonable alternative methods of

communicating with the faculty were available. For example, meeting after school hours or contacting teachers at school or home through the United States' mails. Finally, they suggested that union activities on school property might be disruptive of the educational process.

The opinion of the United States Court of Appeals for the Fifth Circuit, later affirmed without opinion by the Supreme Court, conceded that schools were not traditional public forums in which outside vistors may freely express their views. Moreover, school administrators must be given broad discretion in supervising the visitation to the schools by persons not associated with the school. The Court found that the mere fact that other civic groups had been granted access by the district was not dispositive. The union was found not to be "similar" to these other groups, whose purposes were wholly different than those of the unions. To the extent that the regulation would have prohibited access by union organizers during school hours, the District's regulations were held to be valid. The Court also upheld those portions of the regulations which denied the use of school distribution facilities to all employee organizations.

In all other respects, however, the regulations were found to be invalid.

Teachers in the district, as distinguished by the court from the "outsider" union, were found to have First Amendment rights, even within the school day. Evidence at the hearing before the lower court indicated that school officials had interpreted the regulations as prohiting any discussions among teachers relating to union business, even discussions during lunch hour or preparation periods. Even though the district was found not to have attempted to enforce this provision, the rule, standing alone, was found to chill the teacher's freedom speech in violation of their First Amendment rights.

Similarly, to the extent the teachers were permitted to use school distribution systems for personal business, the court found that they were also entitled to use those facilities for conduct of union business.

Thus, the court has distinguished between the rights of teachers, as insiders in the school system and unions as "outsiders." In the former case, if not the later, it has determined that First Amendment rights must be respected.

B. Students

The courts have also drawn distinctions in analyzing the First Amendment rights of students. In Tinker v. Des Moines Independent Community School District, a 1969 decision, the Supreme Court struck down school regulations which (a) prohibited students from wearing black arm bands to display their disapproval of the Vetnam War and (b) authorized the suspension of any student failing to comply with the regulations. While recognizing the need for preserving the authority of school officials to prescribe and control conduct in the school, this regulation was found to conflict with the students' First Amendment rights. The conduct banned was found to be a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the students. The Court found no evidence of interference, actual or potential, with school work or the rights of other students to be secure and to be left alone.

The Court found that any words spoken in the class, in the lunchroom or school facilities that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution, the Court found, requires that we take that risk. In order for a school to

justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. In the absence of a specific showing of constitutionally valid reasons to regulate student speech, students are entitled to freedom of expression of their views.

The limitations of the Tinker decision were made clear in the Supreme Court's 1986 decision in Bethel School District v. Fraser, a case discussed at this seminar last year. Bethel, you will recall, involved a student who made a fairly offensive speech, nominating another student for an office in student government. The speech was filled with obvious sexual inuendo including comments like "driving it home" and bringing a matter to "climax." The Supreme Court, while recognizing the rule previously anounced in Tinker, found that this speech was not protected by the First Amendment.

It is unclear at this time whether 1986 Court, a significantly more conservative court than its 1969 counterpart, is cutting back on the Tinker rule. Certainly the two decisions can be reconciled. Yet, as you read the

two decisions, there is significantly more emphasis on the importance of maintaining discipline in the public schools. For example, the Bethel Court said:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of the civilized social order. Consciously or otherwise, teachers -- and indeed the older students -- demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models . . . . The schools, as instrumentalities of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

While the court expressly reaffirmed the rule of Tinker, it distinguished the present case from it. More importantly, the emphasis is entirely different.

C. Other First Amendment Issues

It is also possible that you, as school adminstrators, may see First Amendment issues in other contexts. The First Amendment, for example, not only prohibits State support of religion; it also guarantees the free exercise of religion.

Applied to employees of your district, that requires reasonable accommodation to the religious beliefs of your employees. You will see this in Title VII complaints; you may also see it in a §1983 action. This obligation is not limited to the principal or established religions. A religious belief, if sincerely held, is entitled to protection even though majority of our citizens would regard as a misguided or bizzare. I submit, for example, that you cannot complain if a district employee should convert to Siikhism, grows a beard and begins to wear a turban. There are, as you know, religions which prohibit, for the truly observent, work on the Sabbath. In some cases, that Sabbath is on Saturday. This will not generally impact your instructional staff, but it will certainly impact your non-instructional staff.

There are some limitions on your duty to accommodate to religious beliefs. In Trans World Airlines v. Hardison, the Supreme Court held that "reasonable accommodation" does not require an employer to permit an employee to work on a four-day week to avoid working on the Sabbath or to replace an employee on Saturday with another employee at overtime wages. Requiring an employer to bear more than a minimal cost would create an "undue hardship" on the school district.

Similarly, the Supreme Court's decision last year in Ansonia Board of Education v. Philbrook, establishes that the district meets its burden when it provides a reasonable accommodation. It is not required to accept some alternate accommodation proposed by the employee. In that case, the district had permitted the use of personal leave for religious holidays. Philbrook, the employee, would have preferred that the district either grant him three additional paid leave days for religious observance or an arrangement under which he would have paid for the cost of the substitute and received full pay for days on which he observed his religion. The Court found that the alternative proposed by the district was appropriate and that it was not required to accept Philbrook's suggestion.

If you think these problems are arcane, you might consider the situation of the Monroe-Woodbury School District in Sullivan County. Within the confines of the Monroe-Woodbury district, there are several communities of Chasidic Jews. The tennents of this religion require the education of their children in parochial schools. They receive only bus transportation from the Monroe-Woodbury district. That bus service is staffed by District employees who are represented by the Civil Service Employees Association. A provision in the collective agreement, a

common provision in many school district contracts, authorizes the bus drivers to bid for runs each year on the basis of senority. These runs differ in length and that fact impacts the compensation an employee can receive and his or her fringe benefits.

Three factors have combined to create Monroe-Woodbury's present dilemna. The Chasidic runs are the longest and thus the most desirable runs for the bus drivers to select. Almost all of the senior bus drivers in the district are females. Finally, the rules Chasidic prohibit boys from riding on a school bus driven by a female driver. If a female driver arrives, Chasidic boys will refuse to board it.

The district attempted to deal with this problem by assigning only males to the Chasidic runs. At some point, the female bus drivers recognized that they were being denied the opportunity to bid for these desirable runs. They filed a grievance under their collective agreement and an arbitrator has sustained their position. He ruled that the district was required to offer these runs to the female drivers even though the boys would refuse to board the bus.

Consider the situation of the district; it is required by the terms of its collective agreement to offer these runs to its female drivers. The Chasids, who draw only bus service from the district, are becoming increasing concerned. One additional fact makes the district's dilemna even greater. The Chasids are the fastest growing group in the Monroe-Woodbury community. There is a religious obligation on the members of the sect to have as many children as possible. In four or five years it reasonably may be anticipated that the Chasidics will constitute a majority of the electorate.

This is not theory, this is ongoing reality.

III. The Fourth Amendment

After of a period of uncertainty, the Courts seem to have clarified the rights and obligations of public employers in the area of searches and seizures. This is, of course, not a problem in the private sector. Special obligations are imposed on public employers, because of the Fourth Amendment's prohibition against unreasonable searches and seizures by government agencies.

Let us start with a few basis principles. If you ask a student to turn out his pockets or open her purse, that is a search. If you ask a student to open her locker or if you go through the lockers randomly when students are not there, that is a search. If you ask a student who drives to school to open the trunk of his car, that is a search.

The courts have recognized that there are areas in which a person has a reasonable expectation of privacy. In criminal matters, a search by a State or State agency which invades the area in which privacy is expected, can only be conducted upon a showing of probable cause. As you know, before a search warrant can be issued, signature of a judge is required.

A. Students

Matter of New Jersey v. T.L.O., establishes a more lenient standard for school districts. Again, as in Bethel, the Supreme Court focused on the nature of the school environment. There a teacher discovered a 14-year-old girl smoking cigarettes in the school lavatory, in violation of a school rule. He took the girl to the principal's office, where they met with an assistant vice-principal. When the girl, in response to questioning, denied that she had been

smoking, the assistant vice-principal asked to see her purse. Upon opening her purse, he found a pack of cigarettes and also noticed a package of rolling papers. He then proceeded to search the purse thoroughly and found marijuana, a pipe, plastic bags, a substantial amount of money and an index card containing a list of students who owed the student money. The issue presented to the Court was whether this search violated the Fourth Amendment.

The Court first held that the Fourth Amendment's prohibition on "unreasonable" searches and seizures applied to searches conducted by public school officials. That finding, however, was not dispositive. The Court continued, that what is "reasonable," depends upon the context in which a search takes place. The Court concluded:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy but in recent years school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.

The Court continued that the school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search

> "We join the majority of courts that have examined this issue and concluded that the accommodation of the privacy interests of school children with the substantial need of teachers and administrators of freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based upon probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of the search of the student should depend simply on the reasonableness under all the circumstances of the search."

The standard articulated by the Court is a fairly imprecise one; one that depends upon the circumstances of each case. The basic premise, according to the Court, is a rule of reason and common sense. You should conduct a search only if some objective evidence suggests invasion of a student's privacy is warranted.

The search should be no more than that absolutely required. You cannot, if you find a student smoking, immediately order a strip search. New York Court of Appeals has described the factors to be considered in determining the sufficiency of "cause" to search a student as the child's age, his or her history and record in the school, the problems and seriousness of the problem in school to which the search was directed and, of course, the need to make the search without delay. Of particular importance, the Court suggested was the observation of the student to be

searched over a sufficient period, whether hours, days or longer, which suggests that at least more than an equivocal suspicion that he or she is engaged in dangerous activities. Interestingly, the Court in that case, People v. Scott D., suggested that there would have been a sufficient basis for a strip search if glassine envelopes were found in the respondent's wallet. The further indignity of the strip search would have been warranted to make sure that the student did not possess a still larger supply of drugs and to establish the role he played in carrying the drugs.

B. Employees

The T.L.O. rule was extended to public employees in O'Connor v. Ortega by the Supreme Court in March of this year. Ortega was a psychiatrist employed in a state mental hospital in California. Hospital officials became concerned about possible improprieties in Dr. Ortega's management of the hospital's residency program. They were particularly concerned that he appeared to have used general funds to purchase a computer for use in the residency program. Ortega was placed on administrative leave during the investigation of the charges. During his absence, an "investigative team" entered his office for the stated purpose of the return of state property. The fruits of this

search were used in subsequent disciplinary proceedings against Ortega.

The Court concluded that Ortega had a reasonable expectation of privacy against intrusions by the public in his office and specificly his desk. The Court suggested that there might be an exception to that rule in the case of work-related intrusions. The court commented "in many cases offices are continually entered by fellow employees and other vistors during the workday for conferences, consultations and other work-related visits." As against those types of intrusions, the Court held there was no reasonable expectation of privacy. The Court did find, however, that Ortega had a reasonable expectation of privacy at least in his desk and file cabinets. That, however, again, did not conclude the inquiry. As in TLO, the Court suggested that Ortega's privacy interests must be balanced against the realities of the work place. It specifically found that the requirement of a judicially signed warrant based upon "probable cause" would be unworkable.

The Court concluded:

> The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the work place. Government

> agencies provide myriad services to the public and the work of those agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or a piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of the search is to retrieve a file for work-related reasons . . . . We hold therefore that public employer intrusions on the constitutionally protected privacy interest of government employees for non-investigatory work related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.

C. Drug Testing

The decision in Patchogue-Medford Congress of Teachers, decided by the Court of Appeals this spring, has resolved the issue of drug testing as a search and seizure in the public schools. There the Court of Appeals, applying New York rather than the federal Constitution, found that requiring teachers to submit to routine drug tests is an unconstitutional search and seizure. Reliance on the State Constitution is significant for it means that random drug testing will be impermissible in New York, whatever the Supreme Court later decides on this subject. [One amusing

aspect of the case was the suggestion by the school district that there was no search and seizure as part of the testing program since the employee intended to give the tested material away.] The Court did agree, however, that reasonable suspicion, not probable cause expressed in a warrant, is all that is required. In other words, you cannot conduct drug tests of all your teachers or students or even random drug tests. If, however, you have any reason to believe that a particular student or teacher is abusing drugs, you have the right to require that employee or that student to submit to a drug test.

IV. Fourteenth Amendment Claims

The Fifth Amendment to the United States Constitution prohibits the deprivation of liberty or property without due process of law. By virtue of the Fourteenth Amendment, the obligations of the Fifth Amendment are imposed upon the states. One of the interests protected by the Fifth and Fourteenth Amendments is a so-called "liberty" interest. That, in turn, has led to a body of case law which has held that even a probationary or other non-tenured employee is entitled to a "name-clearing hearing" when he is disciplined or discharged for reasons which are "stigmatizing." A charge that an employee is guilty of dishonesty or

immorality is stigmatizing because they call into question the person's good name, reputation, honor or integrity. The charge that an employee is merely "incompetent" is not stigmatizing.

There are a number of prerequisites for a name-clearing hearing. The employee first must request it. Second, he or she must allege that the reasons for the disciplinary conduct are false. Codd v. Velzer. Finally, he must show that there has been some public disclosure of the allegedly stigmatizing reasons.

In the past, the latter requirement, public disclosure meant what the term suggests -- a requirement that the employing agency disclose to the newspapers, in a newsletter, at a public meeting or to a prospective employer reasons for the disciplinary action. The Supreme Court has reasoned that if a communication is not made public it cannot properly form the basis for a claim that the employee's interest in his good name, reputation, honor or integrity thereby was impaired.

The United States Court of Appeals for the Second Circuit in New York has dramatically changed these requirements. In Brandt v. Murphy, a case arising out of

the Suffolk BOCES, Brandt, a substitute special education teacher, was dismissed from his position on charges of various acts of sexual misconduct involving his students. Brandt requested a name-clearing hearing, alleging that the charges against him were false. The BOCES board declined to grant such a hearing.

The Court of Appeals found that in fact there had been no disclosure of the investigation leading to the dismissal except to members of the investigating team. The Court found, however, that the district had prepared a memorandum describing the investigation and its findings which was placed in Brandt's personnel file. This, the Court concluded, was sufficient to meet the requirement of publication. The Court stated:

> "In this case we consider the effect on Brandt's future job opportunities since that is the harm he contends will result from dissemination of the reasons for his discharge. If Brandt is able to show that prospective employers are likely to gain access to his personnel file and decide not hire him, then the presence of charges in his file has a damaging effect on his future job opportunities. Brandt need not wait until he actually losses some job opportunities because the presence of the charges in his personnel file coupled with a likelihood of harmful disclosure already places him between the devil and the deep blue sea. In applying for jobs, if Brandt authorizes

> the release of his personnel file, the potential employer would find out about the allegations of sexual misconduct and probably would not hire him. If he refuses to grant authorizations, that too would hurt his chances of employment. Thus, Brandt would not be as free as before to seek another job."

The prospect of a name-clearing hearing is not as onerous a burden as a disciplinary proceeding under §3020-a of the Education Law or even §75 of the Civil Service Law.

In Cleveland Board of Education v. Loudermill, the Supreme Court suggested that a pre-termination name clearing hearing can be something less than a full evidentiary hearing. The Court described it, although the case involved a tenured employer who later would be entitled to formal post-termination disciplinary hearings, as an initial check against mistaken charges. Specifically, the Court held that the employee is entitled to written or oral notice of the charges, an explanation of the employer's evidence against him, and an opportunity to present his side of the story. A full evidentiary hearing is not required. Indeed, the Court suggested that an opportunity to respond orally and in writing and to present rebuttal affidavits would be sufficient.

In Matthews v. Harvey County, the 9th Circuit Court of Appeals in June of 1987, the Court applied Loudermill to a probationary teacher in her first year of employment.

Some concern, however, is raised by Brock v. Roadway Express, a case decided by the Supreme Court in December of 1986. Although Brock did not involve public employment, the Court expressly indicated that it was applying Loudermill. There the Court found that, at least in some cases, an opportunity to examine the employee's affidavits and supporting evidence and an opportunity to meet with the administrator who investigated the charges might also be required.

In any event the requirements of a name-clearing hearing are not overly onerous ones and I would strongly urge upon you that you not to lightly reject an employee's request for such a hearing.

Conclusion

To suggest that in 30 or of 45 minutes we can touch all of the constitutional rights of teachers or students is unrealistic. There are vast areas which there is simply not time to cover. I would close these remarks, as I started

them. Federal and State courts, through the vehicle of §1983 actions, have given teachers and students important new tools to hold public officials accountable for actions which are found to infringe their constitutional rights. While you probably should not sleep with a copy of the Constitution under your pillow, thinking through the implications of what you do before you take adverse action against a student or a teacher probably is always a good idea.

Thank you.

CONSTITUTIONAL RIGHTS OF STUDENTS & TEACHERS

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(Revised)

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AVOIDING THE FRUSTRATIONS OF THE EDUCATION LAW, SECTION 3020-a PROCESS

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Presented at the

Second Annual School Law Conference

of the
Capital Area School Development Association

Century House
July 16, 1987
Latham, New York

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Remarks
July 16, 1987

A. Introduction: "Avoiding the Frustrations of the Education Law, Section 3020-a process", as well as "Avoiding Formal Disciplinary Proceedings"

1. How neutrals view the disciplinary process affects how both management and labor must view the disciplinary process

2. Standards of review by neutrals--what makes a disciplinary case a solid one--based on just cause

3. Common reasons disciplinary cases fail, and what management can do to either eliminate or prevent them

B. How to Avoid Discipline? Is it Possible?

1. Ignore the disciplinary problem

2. Develop and communicate a clear statement of policies/rules to all staff and to the public

3. Communicate with and counsel employees who fail to abide by such policies/rules, or commit acts of misconduct, immediately upon learning of such failure or acts. Exception if act is "capital offense"

4. Act immediately in face of "capital offense"

5. Insist upon accurate, honest and straight talking evaluations. Weak supervisor often delays action in hope that problem will go away, only to over-react when problem becomes more serious. Over-reaction to an ignored or accepted long-time course of conduct will always result in failure of disciplinary actions when reviewed by neutral.

6. Consider the future. Down side of failed disciplinary action, results in conflict/hostility, which often creates worse problem than original disciplinary problem.

C. Why do you want to discipline? Motivations.

1. Corrective/affirmative purposes

2. Punitive

3. Dismissal from employment

4. Are you sure this is the way to go? Importance of having a strong commitment to the disciplinary action--does your Board/Management have what it takes to see this thing through, even though that may be a long time?

D. What is the basis for discipline?

1. Interview all witnesses and complainants

2. Review all relevant documents

3. Analyze all the facts, including those unfavorable to your own position.

4. Can you provide necessary proof of facts? Its one thing to know the truth--proving it is something different altogether. Knowing when to consult with legal counsel, and how they can be of help.

E. Importance of understanding concept of Burden of Proof

1. Definition of concept--must prove each and every aspect of charges--standards of evidence.

2. Relationship to specific charges. Why drafting of charges is often most important part of Section 3020-a disciplinary process. Do you mean what you say?

3. Review all evidence first, then draft charges. Charges cannot be amended to conform to proof; rather the proof must fully support the specific charges.

F. Complexity of Section 3020-a process

1. Legal proceeding. Cannot minimize failure to properly observe all procedural requirements.

2. Time limitations

3. Amending the charge

4. Specificity requirements, procedural niceties

5. General technicalities of 3020-a process. Place for experienced legal counsel who understand process, and not for educators.

G. Role of Equity in Disciplinary Process

1. Employee has right to know what is expected conduct and/or performance level

2. Employee has right to know consequences of failing to meet stated expectations.

3. Discipline is based on facts, not rumor or feelings.

4. Employee has right to equal treatment. Consistent and predictable responses to violations of rules and/or policies is an essential aspect of disciplinary system. All employees must receive same treatment for same violations or acts.

H. Progressive Discipline

1. Notice of misconduct

2. Counselling

3. Reprimands

4. Suspensions

5. Dismissal

6. Capital Offenses

I. Summary: Avoiding Discipline

1. Clearly stated rules/policies

2. Direct communication to employees of rule/policies

3. Accurate, honest evaluations, which face up to existent disciplinary problems

4. Evaluation of probationary period, with an eye towards disciplinary problems

5. Counselling of unacceptable conduct or performance

6. Establishing policy of consistent and predictable responses for violations of rules/policies or other misconduct.